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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No.

BRIGHAM YOUNG UNIVERSITY,
PETITIONER

vs.

UNITED STATES OF AMERICA
AND JAMES OYS,
AN OFFICER OF THE
INTERNAL REVENUE SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether, the private records of a charity are susceptible to search by the Internal Revenue Service on the bare assertion that some donors, who are unrelated in every way to those whose records are sought, have claimed excessive values for gifts made to the charity.

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Brigham Young University petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. A., infra, 1a-12a) is reported at 485 F. Supp. 534. The opinion of the court of appeals (App. B, infra, 13a-26a) is reported at F.2d .

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1982. Petitioner moved for a rehearing on July 29, 1982 which motion was denied on August 26, 1982 (App. C, infra, 27a, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent portions of the Internal Revenue Code, Sections 7601, 7602 and 7609(f) are set forth in Appendix D, infra, 29a–31a.

STATEMENT

1. Brigham Young University (BYU), petitioner herein, is a private university organized under the laws of the State of Utah. The university is qualified as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code.

2. From time to time, Brigham Young University (BYU) receives donations of cash and other property. Upon receipt of a donation, BYU acknowledges the contribution in a letter

of gratitude, but BYU has no knowledge as to the values claimed by donors on their returns, and is not involved in any way in arriving at such values or in suggesting that inflated values be claimed.

3. During the years relevant to this action, BYU received a large number of donations of art objects which had been arranged by the same art dealer who, the IRS concedes, was not in any manner associated with BYU. BYU also received 66 donations of silver mining claims, all arranged by the same geologist, who again, was not associated with petitioner in any way. With the cooperation of petitioner in identifying donors in these categories, the IRS audited all 148 taxpayers and alleges that most had claimed deductions exceeding the fair market value of their gifts. In each case, the donors had purchased the donated property from the art dealer or the geologist with the representation that a deduction could be taken for from two to ten times the donors' cost and that such inflated deduction could be taken in the year of purchase. The IRS does not assert that the donors whose records are sought in this action participated in any such scheme.

4. In addition, the IRS allegedly examined as many as 14 other returns of donors to BYU and determined that they had overvalued their donations.

5. Based on this experience, the IRS contends that it has established a reasonable cause to believe that all or some of the remaining donors of gifts in kind to petitioner may have overvalued their contributions. The IRS concedes that there is no common denominator between the donors audited and the donors whose records it seeks to examine except that each made a gift to BYU. It is the position of the IRS that this showing is sufficient to meet the "reasonable cause" standard of Section 7609(f) of the Internal Revenue Code.

6. Section 7601 of the Internal Revenue Code gives the IRS a broad mandate to "inquire after and concerning all persons . . . who may be liable to pay an internal revenue tax. . . ." Section 7602 confers upon the IRS the power to summon documents from any source provided the documents are relevant or material to the IRS's investigation. Section 7609, apparently passed in 1976 in response to this court's decision in *United States v. Bisceglia,* 440 U.S. 141 (1975), was enacted to provide some measure of protection for records in the hands of third party record keepers. Section 7609(f) requires the IRS to make a showing that the summons is limited to an ascertainable group or class of persons and that *reasonable cause* exists to believe members of this group or class may have failed to comply with the internal revenue laws.

7. In this case the IRS obtained a summons for the records of BYU concerning all donors in kind for the years 1976 to 1978. BYU challenged the summons, and after hearing, the District Judge refused to grant enforcement on the ground that the IRS had failed to establish any link between the filers of the examined returns and the remaining donors to BYU. In fact, the IRS had specifically conceded there was no such link; thus the requirement of reasonable cause had not been met.

8. The court of appeals reversed this holding, reasoning that the mere fact that 162 donors of gifts in kind to petitioner had overvalued their donations was reasonable cause to believe other donors had similarly overvalued their contributions. The court ignored BYU's argument that some common link other than mere donation to the university must be alleged in order to establish a reasonable basis for suspicion. The court also ignored BYU's contention that the Service's "sample" statistics of donors was intentionally marshalled around two tax evasion schemes which the IRS conceded had no relation to the unknown donors.

Reasons the Petition Should Be Granted

I. The IRS' Petition for Summons Is Based on a Logical Fallacy and, Therefore, Cannot Meet the Statutory Requirement That the IRS Have

a "Reasonable Basis" to Believe the Records Being Sought Are Those of Tax Evaders.

The Tenth Circuit ignored BYU's contention that the Section 7609(f) requirement that a summons issue only where there is a "reasonable basis" to believe tax evasion has occurred requires the IRS to prove its suspicions are logical. In its briefs and in argument, BYU pointed out that one cannot make logical conclusions about a group based on characteristics of certain members of the group unless one knows these characteristics are distributed throughout the group. Thus, one cannot make conclusions about the eye color of a group based on the fact that some members are blue eyed. One must have further information about the distribution of eye color in the group to make conclusions about it. It is fallacious logic to draw conclusions about a whole from a part unless one knows how the part relates to the whole. This is the blind man and the elephant fallacy.

In this case the IRS' reasoning amounts to the assertion that gifts to charity are all subject to examination because some taxpayers have used such gifts to underpay taxes. No logical connection between the tax evaders and the remaining donors need be shown.

The most recent decision of this court on the John Doe Summons is *United States v. Bisceglia,* 440 U.S. 141 (1975). In that case the court per-

mitted the IRS to use a John Doe summons to identify the depositor of a large amount of deteriorated high denomination currency. The IRS was able to show that currency in such denominations and in such condition was frequently obtained from untaxed hoards and therefore there was a reasonable prospect that information leading to relevant tax information might be obtained. This court held in *Bisceglia* that the constitution requires only reasonable ground for belief that relevant tax information would result from a John Doe summons. Probable cause was not required. Section 7609 was added to the Code the year following this court's decision in *Bisceglia*. In its reports, Congress cited *Bisceglia* with approval. There is no indication that Section 7609 was any more than an attempt to codify that holding. Congress required only a finding of a "reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, . . ." I.R.C. § 7609(f)(2). This standard is necessarily vague, yet Congress clearly stated that it was not giving the Service carte blanche to obtain a John Doe summons on the mere possibility that tax liability may exist:

> While the committee believes it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, at the same

> time, the committee does not intend that the John Doe summons is to be available for purposes enabling the Service to engage in a possible "fishing expedition." For this reason, the committee intends that when the Service does seek court authorization to serve John Doe summons, it will have specific facts concerning a specific situation to present to the court.
>
> House Ways & Means Committee, H.R. No. 94-658, 94th Cong., 2d Sess., *as quoted in* 1976 U.S. Cong. & Adm. News 3207.

In this case, the Service claims the right to define the group or class of persons it may reasonably suspect on any common trait regardless of how remote such common denominator may be from the specific fact or specific situation which triggered IRS interest. Thus, so long as the unknown taxpayers share any common characteristic with the audited taxpayers, their records are susceptible to a John Doe summons. In this case the IRS asserts that the mere fact of a gift in kind to BYU justifies a search of taxpayer records.

The Tenth Circuit opinion grants this unrestrained power to the Service. The Service concedes that the John Doe contributors share no other characteristic with those whose returns it has examined except all made gifts in kind to BYU. The Service admits that there is no evidence of a common scheme or means of arriving

at gift valuations. The Service instead argues that since some donors overvalued their donations to petitioner, it is reasonable to believe others may also have overvalued their gifts.

> We conclude that having previously examined the returns of some 162 donors of gifts in kind to BYU and having found that all were overvalued, the IRS has established a reasonable basis for believing that *some* of the remaining donors of in kind gifts *may* have also overvalued their gifts. Such reasoning makes sense to us.
>
> Appendix B, page 26a.

This is a standard without limit, without logic. All taxpayers share common characteristics with each other—they have the same color of hair, work at the same office, visit the same doctor, vacation at the same resorts. If the Service discovered that hundreds of taxpayers who lodge at Hilton Hotels take excessive medical deductions, the IRS would under this rationale be able to subpoena all the records of Hilton Hotels. Obviously *Bisceglia* never sanctioned such far-ranging powers and Congress, in codifying *Bisceglia*, intended that the criteria for defining a group of taxpayers to be investigated have some "reasonable" relationship to the specific circumstances triggering the investigation.

II. The IRS' Petition for Summons Is Based on Erroneous Application of Statistical Analysis

and Therefore Does Not Meet the Statutory Requirement of Reasonable Basis.

The IRS and the Tenth Circuit have relied on the barter exchange cases as authority for issuing the summons in this case. The barter cases (*In re John Does, Members of the Columbus Trade Exchange,* 671 F.2d 977 (6th Cir. 1982) and *United States v. Pittsburgh Trade Exchange, Inc.,* 644 F.2d 302 (3rd Cir. 1981)) all involve companies which have been organized to facilitate the exchange of goods or services without any cash payments. In these cases the IRS was able to show that such transactions are often used to disguise taxable transactions and to avoid reporting them. In fact, one of the principal reasons for barter transactions is to avoid taxes.

These cases, however, are not relevant to the BYU case. There are a great many reasons for making gifts to a university. A feeling of obligation to one's alma mater, a desire to further the education of the young, a need for recognition, a desire to serve, etc. None of these is related to tax evasion. Thus there is nothing inherently suspect, from a tax point of view in making a donation to a university.

The Service seems to be arguing that it has sampled 162 returns of BYU donors and on the basis of that sample it was concluded that BYU donors are likely to be tax evaders. This would be reasonable if the 162 donors were a true unbiased sample.

A fundamental of statistical sampling is that the sample be unbiased, i.e., that there is a reasonable probability that the sample includes a fair distribution of the characteristics of the population being sampled (Packard & Faulconer, Introduction to Logic, 41 (1980)).

In this case the IRS admits it drew the entire sample from suspect transactions. BYU furnished the names of all art donors under an IRS subpoena and the names of missing claim donors were obtained by subpoena from the geologist who originated the scheme. Thus, the sample was neither random nor unbiased. Only suspected tax evaders were included. Clearly this cannot be said to be a representative sample of BYU donors. The sample forms no "reasonable basis" for enforcing the summons.

III. Certiorari Should Be Granted Because the Decision Below Destroys the Protection of Privacy Created by Section 7609(f) for Third Party Records.

While there is at present no precise conflict between the circuit concerning the interpretation of Section 7609, the courts have failed to give any weight to the restraints on third party searches imposed by this court in *Bisceglia* and the Congress in § 7609. Confusion has resulted.

In the instant case, the district court in Utah

determined that the IRS sampling of petitioner's donors did not constitute a reasonable basis for suspecting overvaluation by completely unrelated donors. The Tenth Circuit Court reversed this finding but did not attempt to define guidelines by which district courts might review such issues in the future. In the Third Circuit, the IRS compelled production of all records of a barter-exchange association with a John Doe summons on the allegation that such transactions are "inherently susceptible to tax error." See *United States v. Pittsburgh Trade Exchange Inc.*, 644 F.2d 307 (3rd Cir. 1981). On almost identical facts, in the Sixth Circuit, the district court determined that the IRS could not meet its burden of "reasonable basis" by extracting statistics from similar but unrelated transactions. The Court of Appeals reversed, holding that the transactions as a body were historically and inherently suspect. See *In re John Does, Members of the Columbus Trade Exchange,* 671 F.2d 977 (6th Cir. 1982). The Fifth Circuit reconsidered its decision in *United States v. Humble* following this Court's holding in *Bisceglia* and determined that enforcement of the John Doe summons was still improper where the information sought did not relate to a specific, extraordinary transaction, nor did the facts support the likelihood of unpaid taxes. See *United States v. Humble Oil & Refining Co.,* 518 F.2d 747 (5th Cir. 1975). In the Tenth Circuit, the Oklahoma federal court for

the western district, ruled in a case closely analogous to petitioners that the IRS could not demonstrate a reasonable basis for suspecting non-compliance by oil and gas producers connected with Kerr-McGee. That court determined that statistics sampling similar agreements and contractors were an insufficient basis to conclude that tax evasion may occur. See *In re Oil and Gas Producers,* 500 F. Supp. 440 (W. D. Okla. 1980).

The Supreme Court should grant certiorari in this case to clarify the meaning of the term "reasonable basis," and to insure that the right to privacy of those whose records are protected by Section 7609(f) will be maintained. If the decision below is allowed to stand the statutory protection will be totally destroyed. The IRS will have unrestrained access to private records on the mere assertion that a tax evader is in some way (however remote) related to another taxpayer. Logical connection will not be required.

Conclusion

To preserve the privacy of third party records from unwarranted and unlawful intrusion by the IRS, petitioner prays that the Supreme Court grant certiorari in this case.

Respectfully submitted,

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